No. 89-443

In The

Supreme Court of the United States

October Term, 1989

CAJUN ELECTRIC POWER COOPERATIVE, INC., *ET AL.*,

Petitioners,

versus

LOUISIANA PUBLIC SERVICE COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Louisianna

BRIEF OF THE LOUISIANA PUBLIC SERVICE COMMISSION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Should this Court overturn or modify its 1983 decision in *Arkansas Electric Cooperative Corporation v. Arkansas Public Service Commission*, 461 U.S. 375, 76 L.Ed.2d 1, 103 S.Ct. 1905 (1983), which held that State utility commissions are not preempted from regulating the intrastate wholesale rates of electric cooperatives by the Federal Power Act or by the Rural Electrification Act, where neither act has been amended, the REA has not altered its regulations to preempt State regulation, and the challenged order of the Louisiana Public Service Commission merely asserts jurisdiction over the Louisiana cooperatives and has not established any new rates?

LIST OF ALL PARTIES

Cajun Electric Power Cooperative, Inc.

Southwest Louisiana Electric Membership Corporation

Teche Electric Cooperative, Inc.

Claiborne Electric Cooperative, Inc.

Jefferson Davis Electric Cooperative, Inc.

Northeast Louisiana Power Cooperative, Inc.

South Louisiana Electric Cooperative Association

The Louisiana Public Service Commission

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STATEMENT OF THE CASE

Petitioners, certain Louisiana electric cooperatives, ask this Court to overrule or modify its decision in *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Com'n*, 461 U.S. 375, 103 S. Ct. 1905, 76 L.Ed 2d 1 (1983), and hold that the Louisiana Public Service Commission ("Louisiana Commission"), respondent, is preempted from regulating the wholesale and retail electric rates of the cooperatives. The cooperatives rely heavily on language from *Arkansas Electric Coop.* suggesting that – although preemption was not intended by Congress in the Rural Electrification Act – it conceivably might occur if a) the Rural Electrification Administration ("RFA") announced a rule preempting State regulation, or b) a State set a rate that seriously compromised important federal interests. Yet the cooperatives fail to show that either of these hypothetical situations exists; indeed, the announced policy of the REA requires cooperatives to comply with State regulatory requirements, and the Louisiana Commission has not even set a new base rate for any cooperative in this case.

On September 3, 1987, the Louisiana Commission issued Special Order No. 8-87 and asserted regulatory jurisdiction over all electric cooperatives operating in Louisiana. That order stated:

> IT IS ORDERED, that the Commission, pursuant to the authority granted it by the Louisiana Constitution, reaffirms its regulatory authority including its authority to fix reasonable rates and regulate service, and will exercise its jurisdiction over the electric cooperatives operating in Louisiana . . .

> The staff and legal counsel of the Commission are directed to institute proceedings to examine the rates charged and service rendered by these cooperatives. (Pet. App. at 79a-80a).

Before any rate investigation began, the petitioners, certain generation and distribution cooperatives affected by the order, filed suit in the Nineteenth Judicial District Court for the State of Louisiana challenging and seeking to enjoin the Commission's assertion of jurisdiction over them. The suit was dismissed, with prejudice, by the district court. The Louisiana Supreme Court initially reversed the district court's ruling, but granted rehearing and reversed its previous opinion, thus upholding the Commission's assertion of jurisdiction. The Commission has not to date held hearings or issued orders to alter the base rates charged by any of the cooperatives in this proceeding.

The Louisiana Constitution delegates the following powers to the Commission:

> The Commission shall regulate all common carriers and public utilities and have such other regulatory authority as provided by law. La. Const. 1974, Art. 14 § 21(b).

In 1974, on the effective date of the Louisiana Constitution, the Commission actively regulated electric cooperatives, including the petitioners, and had regulated them pursuant to statutory authority since 1970. La. R.S. 12:426 (1970). In 1978, however, the Louisiana legislature attempted to statutorily remove Commission jurisdiction over cooperative rates if those rates were first "approved by the board of directors of the electric cooperative and by the federal government or any agency thereof." La.

R.S. 45:1163. As a result of this amendment, and despite the constitutional mandate, the Commission stopped regulating the rates of cooperatives at that time. This statute was again amended in 1983 to allow the Commission to regulate any cooperative that elected Commission jurisdiction by a vote of its membership. As a result of such elections the Commission began regulating several Louisiana cooperatives.

After a rate refund order was issued concerning one of the cooperatives that elected to submit to Commission jurisdiction, an appeal was taken to the Louisiana Supreme Court. *Dixie Electric Membership Coop. v. Louisiana Public Service Com'n*, 509 So. 2d 1002 (La. 1987). Without deciding the issue, the Court suggested strongly that the Louisiana Commission's plenary regulatory authority over utilities under the State constitution could not be curtailed by legislative enactment. *Id.* at 1005. Subsequently, the Louisiana Commission issued the order reaffirming its jurisdiction that is the subject of this case. (Pet. App. at 77a-80a).

The cooperatives brought an injunction suit against the Commission's order, asserting a number of objections to the Commission's assertion of jurisdiction. Most of these arguments were based on asserted principles of State law, although the preemption argument was raised. The cooperatives presented the testimony of Thomas Heath, the assistant to the deputy director of the REA, but he testified that REA policy requires cooperatives to comply with State regulatory requirements. He said:

> Where the state has made it clear that there is jurisdiction in a public utility body, for the cooperatives, we expect the cooperatives to seek

> approval of whatever actions are within that jurisdiction.
>
> (Pl. Ex. 1 at 15; App. at 13).

The district court rejected the preemption argument. It relied on this Court's decision in *Arkansas Electric Coop.* Further, the district court found that there is no REA policy to preempt State regulation. It stated:

> In addition to resting on the opinion of the Supreme Court noted above, the Court finds nothing in the record made at the trial of this matter which would indicate any attempt on the part of the Rural Electrification Administration to preempt the state's authority to regulate rates. The procedure utilized by the REA in examining the rates and approving the rates of the various cooperatives is one that does not lend itself to a careful study of all of the issues involved in rate regulation. The entire interest of the REA seems to be geared toward guaranteeing sufficient rates in order for the various cooperatives to meet their debt obligations. The evidence in the record does not indicate that the REA in any way, acts as a watch dog over rate regulations. For these reasons this Court concludes that the power of the Public Service Commission to exercise its jurisdiction over the plaintiff-public cooperatives is not preempted by federal law.
>
> (Pet. App. 5a-6a).

Of course, the cooperatives did not even attempt to prove a conflict between a rate and a federal interest, because no rate had been set at the time. Indeed, new base rates have not yet been set by the Commission for any of the petitioners.

Contrary to the apparent suggestion of the cooperatives, the Louisiana Supreme Court in its initial decision did not explicitly or implicitly rely on federal preemption as a ground for denying jurisdiction to the Louisiana Commission. (Pet. at 5; Pet. App. at 22a-23a). The Court based its decision on State constitutional grounds. On rehearing, the Court reversed that decision and explicitly rejected the cooperatives' preemption argument. (Pet. App. at 42a-43a).

REASONS FOR DENYING THE WRIT

In *Arkansas Electric Coop.*, this Court held that the Arkansas Commission's assertion of jurisdiction over the wholesale rates charged by Arkansas Electric Cooperative to its members was not preempted by federal law. *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Com'n*, 461 U.S. 375, 103 S. Ct. 1905, 76 L.Ed. 2d 1 (1983). It did so after an examination of the Federal Power Act and the Rural Electrification Act, finding that the legislative history of neither act exhibited an intent to preempt State regulation. *Id.* at 383-88. It further found that the Rural Electrification Administration *required* its borrowing cooperatives to obtain the approval of State regulatory agencies with jurisdiction over local cooperatives, before altering their rates. *Id.* at 387. Finally, the Court noted that should the REA in the future change its policy or should the Arkansas Commission set a rate for Arkansas Electric so low as to compromise federal interests, the actions of the Arkansas Commission *might* be preempted. *Id.* at 388-89.

Arkansas Electric Coop. held that State regulatory agencies are not barred by the Supremacy Clause from asserting jurisdiction over electric cooperatives. Neither of the hypothetical situations posited by the Court – in which preemption *might* occur – exists in this case. No valid reason has been given to reconsider the decision. Therefore, the Court should not review the ruling of the Louisiana Supreme Court.

The factual situation in *Arkansas Electric Coop.* is virtually identical with the case at hand. The Arkansas Commission issued an order asserting jurisdiction over a wholesale generating cooperative; the order set no new rate for that cooperative. The Louisiana Commission issued Special Order No. 8-87 asserting jurisdiction over all electric cooperatives in Louisiana; the order neither set nor changed the rates of any cooperative. Arkansas Electric Coop. argued, as do the petitioners in this case, that the Commission's action was preempted. However, no difference between this case and the *Arkansas Electric Coop.* case exists that would justify a different result.

This Court determined that the Federal Power Act was intended to fill a regulatory gap and was never intended to preclude State regulation of cooperatives. 461 U.S. at 383-85. The jurisdiction of the Federal Energy Regulatory Commission ("FERC") under the Federal Power Act has not changed since that time. The decision of the Federal Power Commission in *Re Dairyland Power Cooperative*, 67 PUR 3d 340 (FPC, 1967), which held the cooperatives financed by the Rural Electrification Administration are not subject to FPC jurisdiction, has not been overruled or modified. The *Dairyland* decision was relied

upon by this Court in *Arkansas Electric Coop. See* 461 U.S. at 384.

This Court also determined that the legislative history of the Rural Electrification Act exhibits no intent to restrict State regulation of cooperatives. 461 U.S. at 385-87. The Rural Electrification Act has not been changed since that time. Further, at the time of the Court's decision, it was the written policy of the REA to require the electric cooperatives to obtain State utility commission approval of all rates set subject to commission jurisdiction. *Id.* at 387-88.

The policy of the REA has not changed since the *Arkansas Electric Coop.* decision, and that fact was amply demonstrated in the record below. REA Bulletin 112-2 requires:

> In states where a regulatory commission has jurisdiction over REA borrowers' rates, the commission of a state will, of course, have to be satisfied as to the reasonableness of the borrower's position with respect to an acceptable rate of return or utility operating margin. (App. at 7).

The REA has not in any way sought to change that policy.

The Petitioners offered the testimony of Mr. Thomas Heath, who is the assistant to the deputy administrator of the REA and who has been employed by the REA since 1958 (Pl. Ex. 1 at 6, 7; App. at 11-12). As he testified, "where the state has made it clear that there is jurisdiction in a public utility body," the REA "expects the cooperative to seek approval of whatever actions are within that jurisdiction." (Pl. Ex. 1 at 15; App. at 13). In fact, according to Mr. Heath, approximately half of the 46

states in which the REA has borrowers are regulating cooperatives in one form or another. (*Id.*) Thus, the REA *still* has a policy requiring cooperatives to comply with State regulation. This policy negates any conclusion that the REA has preempted State regulation.

The cooperatives' application focuses on language from the *Arkansas Electric Coop.* decision stating that State regulation of cooperatives could be preempted by the REA in the future under two possible circumstances: 1) if "the REA changes its present policy, and announces that state regulation of rural cooperative is inconsistent with federal policy," and 2) if a particular rate set by a State regulatory commission "may so seriously compromise important federal interests, including the ability of [the cooperative] to repay its loans, as to be implicitly preempted by the Rural Electrification Act." 461 U.S. at 388-89. The cooperatives argue that both of these situations exist in this case.

The petitioners' argument is without merit. As shown above, the REA's policy is the same now as it was in 1983; *it requires* borrowing cooperatives to obtain State approval for all rate changes, if the State exercises jurisdiction over them. Further, the basic functioning of the REA has not changed since 1983. The REA has always been a lending agency with a great interest in recovering its loans from the cooperatives. 461 U.S. at 386. The cooperatives' attempt to characterize the REA as a regulatory agency is inconsistent with the REA's view of itself and this Court's determination that the REA "is a lending agency rather than a classic public utility regulatory body." *Id.*

As the district court found, the REA acts as a lending agency – not as a rate regulatory agency. (Pet. App. at 6a). The REA still conducts no public hearings on proposed rate changes. (Pl. Ex. 1 at 22-23; App. at 14). There is no presentation of sworn testimony. (*Id.*) There is no cross-examination of witnesses. The REA does not send out notices to interested parties that a rate application is under consideration (Pl. Ex. 1 at 23; App. at 14). The normal process associated with public utility rate approval is still *not* conducted by the REA. The REA's policy and function has not changed since the *Arkansas Electric Coop.* decision.

The cooperatives further argue that any action by the Louisiana Commission with regard to the rates of Cajun Electric will compromise an important federal interest, and the Commission's regulation is therefore preempted. This argument is without merit.

The Louisiana Commission has *not* set any rate for Cajun or for any of the petitioners. The order at issue in this proceeding simply asserts jurisdiction over the cooperatives. Thus, it is indistinguishable from the Arkansas Commission order in *Arkansas Electric Coop.* There, this Court rejected the argument that jurisdiction should be preempted because a future rate set might be too low. This Court stated:

> We will not, however, in this facial challenge to the PSC's mere assertion of jurisdiction, assume that such a hypothetical event is so likely to occur as to preclude the setting of any rates at all. 461 U.S. at 389.

The Louisiana Commission has taken no action that comprises any identifiable federal interest. Indeed, the

Louisiana Commission has actively cooperated with the REA to achieve a mutually advantageous workout plan for Cajun Electric – a troubled generation cooperative. Further, the Louisiana Commission recently agreed to expedite rate proceedings for the Washington-St. Tammany Electric Cooperative, a distribution cooperative that had previously sought bankruptcy protection rather than enact a rate increase. The request to expedite the rate proceeding – filed as part of a workout plan – was made by the federal bankruptcy court and the parties to the proceeding, after the owners of the cooperative and its creditors worked out a rate proposal acceptable to the parties. *In re Washington-St. Tammany Electric Cooperative, Inc.*, No. 87-03106-B (E.D. La.). Moreover, the REA has sought the cooperation of the Louisiana Commission in finding ways to lower the costs of all the Louisiana distribution cooperatives. The Louisiana Commission has expressed a strong interest in working on this project with the REA.

No federal interest has been compromised by the Louisiana Commission. Indeed, new base rates have not yet been set by the Commission for any of the cooperatives in this case. The petition should be denied.

CONCLUSION

No basis exists to overturn the *Arkansas Electric Coop.* decision. No special basis for finding preemption in this case has been established. Therefore, the petition should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES DEPARTMENT OF AGRICULTURE
Rural Electrification Administration

April 8, 1971
Supersedes 9/17/57

Reprinted May 1978

REA Bulletin 112-2

SUBJECT: Electric Retail Rates

I. *Purpose:* To set forth policy and general recommendations with respect to electric retail rates of REA electric borrowers. Retail rates, for the purpose of this bulletin, include all rates and charges for electric service except for power sold for resale.

II. *General Policy:*

A. Each borrower is responsible for adopting appropriate retail rates which will produce the revenue requirements of the system. Revenue requirements may be defined as operating expenses including depreciation and taxes plus an adequate utility operating margin. The utility operating margin should be sufficient to cover the interest on long-term debt, and provide the patronage capital or margins needed to build up and maintain a satisfactory equity position, with a provision, in the case of cooperative borrowers, for rotation of patronage capital on a reasonable basis. As a minimum, revenues should be sufficient to maintain a Times Interest Earned Ratio (TIER) of at least 1.5 in accordance with REA policy and as expressed in mortgage agreements, and to maintain loan feasibility in accordance with those agreements.

B. Each borrower is required to give REA at least 90 days prior written notice of any proposed

change in the retail rate structure. If not already provided, procedure should be established for adequate hearing of consumer complaints.

C. REA will review the rate proposals to determine that they are adequate to support loan feasibility and conform to mortgage requirements. Borrowers will be notified accordingly.

D. REA will render technical assistance to borrowers in developing rates to meet the objectives of the borrower and the rural electrification program and to protect the security of the Government's loans.

III. *Reporting Requirements*:

A. The Federal Power Commission in its Order No. 398, dated April 3, 1970, established certain reporting requirements for changes in rates charged by electric systems serving consumers in communities with populations of 2,500 or more, whether or not such electric systems were otherwise subject to the jurisdiction of the Commission. Copies of FPC Form 82 for reporting such changes may be obtained from REA or the Commission.

B. Two copies of all revised rate schedules, as adopted by the borrower, are to be provided to REA immediately after their adoption. These shall be accompanied by a completed copy of FPC's Form 82 regardless of whether the proposed changes need to be reported to the Commission as described in "A" above.

C. All affected consumers of the system should be notified of the proposed rate change at least 60 days prior to the effective date of the revised rate. This notice should be sent to the mailing

address of each consumer; and may be supplemented by notices in the system's newsletter or advertisements in newspapers having wide circulation throughout the area served by the system, with an explanation and justification for the proposed increase or decrease.

IV. *Retail Rate Design Consideration*: Rates and charges should be designed to produce adequate revenue requirements of the borrower's system and to provide a pricing structure which best meets the borrower's needs. In reviewing existing rates and developing new or revised rates, consideration should also be given to the following elements of retail rate design:

A. Cost of service to each class of consumers.

B. Equitability of rates as between large and small users in the same rate classification and as between large and small consumers in different rate classifications.

C. Characteristics of the rate to encourage the most beneficial use of electricity for homes and farms, to encourage rural industry and rural enterprises, and to induce uses which will improve the system's annual and monthly load factors.

D. Cost levels of other sources of energy in the area.

E. Consumer attitudes and the effect of proposed charges and rate levels on consumer and public relations.

F. Simplicity and clarity of the rate schedules.

V. *Rate Studies*:

A. Borrowers are encouraged to initiate studies of their retail rates periodically by their own staff

or qualified consultants. REA will review retail rate studies and recommendations made by borrowers or their consultants; and furnish comments in connection with their adoption by the borrower.

B. Borrowers desiring REA review or advice and assistance in the preparation of a rate study should furnish:

1. One completed "KWH Distribution Report" REA Form 334. This form may be obtained from REA.
2. A complete set of existing rate schedules.
3. A statement of the amount of revenue reduction or increase desired.
4. Indication of the rate schedule or schedules and the classifications of consumers being considered for the rate change.
5. Full information concerning the borrower's applicable policy or other considerations.
6. Studies and analyses made to determine rate changes proposed by the borrower's staff, by consultants or by regulatory bodies including the background data for each.
7. Copies of rate schedules for similar consumers of all other suppliers in the area.

VI. *Utility Operating Margins*:

A. Utility operating margins, defined as the excess of operating revenues and patronage capital over operating expenses, including depreciation and taxes, should be adequate to provide for interest costs on the long-term debt of the system, plus an additional margin

to develop and maintain an equity capital position sufficient to support its credit requirements. In the case of cooperative borrowers, bylaws generally provide that amounts paid for service in excess of the cost of service are furnished as capital. This patronage capital can be returned to the patrons when the cooperative can meet the tests set forth in the cooperative's bylaws and mortgage.

B. The desired amount of utility operating margins is usually determined by an examination of the capital structure and needs of the borrower's system. The utility operating margin should be adequate, to provide for interest payments on the outstanding debt, and provide for an addition to equity which will tend to achieve and maintain a satisfactory equity position. For cooperative borrowers the margin should provide for revolving patronage capital on a systematic basis once the desired equity position has been reached and the financial condition of the cooperative permits such retirement. The current form of REA mortgage recognizes this factor and limits the amount of patronage capital which can be retired until the borrower has attained an equity of at least 40% of total assets.

C. The traditional approach of regulatory commissions in testing reasonableness of rates is based on a rate of return concept. Rate of return is expressed as a percentage of the rate base. The rate base generally consists of the depreciated value of utility plant less contributions in aid of construction plus an allowance for working capital including materials and supplies and prepayments. The rate of return is thus derived by dividing the utility operating margins by the rate base and expressing

the result as a percentage. For example, a system with a rate base of $4,000,000 having utility operating margins of $200,000 for the test year would be considered as having a return of $200,000. This divided by $4,000,000 time 100 equals a rate of return of five (5%) percent.

D. To approximate a utility operating margin or rate of return which will tend to provide or maintain a desired equity position and provide for return of patronage capital, the debt equity ratio and the period of rotation of patronage capital should be considered. The following examples are included to show the computations involved. These examples consider the rate base as being approximately equal to equity plus long-term debt. If there is significant difference some adjustment may be necessary.

1. A borrower with a 40% equity, or desiring to achieve a 40% equity, and revolving patronage capital on an approximate 10-year basis with 60% long-term debt consisting entirely of 2% REA loans, should have a margin of at least 10% on the equity portion of the rate base (100% + 10 years on the 40% equity) plus 2% interest on the 60% debt. Its utility operating margin or return should then be:

Equity	40% @ 10% =	4.0%
Long-Term Debt	60% @ 2% =	1.2%
Composite Rate of Return		5.2%

2. A borrower with 40% equity and revolving patronage capital on an approximate 15-year basis with long-term debt consisting of 35% REA loans at 2%, other debt at 7.5% interest, should have a margin of at least 6.7% on the equity portion of the rate base (100% + 15 years on the 40% equity) plus 2% interest on the 35% of REA debt and

7.5% interest on the 25% other debt. Its utility operating margin or return should then be:

Equity	40% @ 6.7%	= 2.7%
Long-Term Debt		
REA Loans	35% @ 2.0%	= 0.7%
Other Loans	25% @ 7.5%	= 1.9%
Composite Rate of Return		5.3%

E. When a borrower's equity is below a desirable level, the utility operating margin should be computed on an assumed equity-debt ratio which reflects the desired equity level. This procedure is acceptable to several state commissions as a means of enabling a cooperative to improve its equity position. Patronage capital should be retained to the maximum extent practical until the desired equity is reached, then rotated on a regular basis once the desired equity is achieved and maintained.

F. In states where a regulatory commission has jurisdiction over REA borrowers' rates, the commission of the state will, of course, have to be satisfied as to the reasonableness of the borrowers' position with respect to an acceptable rate of return or utility operating margin.

G. While rates developed according to the above concepts will normally provide amply for cash requirements for repayment of debt and for meeting other mortgage requirements, cash flow studies must be prepared to provide such assurance.

/s/ David A. Hamil
Administrator

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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

EXHIBIT #1

19th JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE LOUISIANA

CAJUN ELECTRIC POWER COOPERATIVE, INC., SOUTHWEST LOUISIANA ELECTRIC MEMBERSHIP CORP., CLAIBORNE ELECTRIC COOPERATIVE. INC., JEFFERSON DAVIS ELECTRIC COOPERATIVE, INC., NORTHEAST LOUISIANA POWER COOPERATIVES, INC., SOUTH LOUISIANA ELECTRIC COOPERATIVES ASSOCIATION, AND TECHE ELECTRIC COOPERATIVE, INC., Plaintiffs, v. THE LOUISIANA PUBLIC SERVICE COMMISSION. Defendant.	No. 321610 Div. "L"

Washington, D.C.

Wednesday, October 21, 1987

DEPOSITION OF TOM HEATH

(p. 1)

19th JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE LOUISIANA

CAJUN ELECTRIC POWER COOPERATIVE, INC., SOUTHWEST LOUISIANA ELECTRIC MEMBERSHIP CORP., CLAIBORNE ELECTRIC COOPERATIVE. INC., JEFFERSON DAVIS ELECTRIC COOPERATIVE, INC., NORTHEAST LOUISIANA POWER COOPERATIVES, INC., SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION, AND TECHE ELECTRIC COOPERATIVE, INC., Plaintiffs, v. THE LOUISIANA PUBLIC SERVICE COMMISSION. Defendant.	No. 321610 Div. "L"

Washington, D.C.

Wednesday, October 21, 1987

Deposition of TOM HEATH, a witness herein, (p. 2) called for examination by counsel for Defendant in the above-entitled matter, pursuant to notice, the witness being duly sworn by GISELLE M. REARDON, a Notary Public in and for the District of Columbia taken at the offices of Steptoe & Johnson, Conference Room 7A, 1330 Connecticut Avenue, N.W., Washington, D.C., at 11:15 a.m., Wednesday, October 21, 1987 and the proceedings being taken down by Stenotype by GISELLE M. REARDON and transcribed under her direction.

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* * *

(p. 6) purposes pursuant to the Louisiana Code of Civil Procedure. The reporter has the authority to place the witness under oath. The parties consent at the beginning it will be conducted pursuant to the procedures of the –

MR. FORTHAM [sic]: Except that this part of the deposition is going to be a discovery deposition and we are going to reconvene.

MR. SUPPLE: Then we will reconvene for a deposition for trial purposes, the trial deposition.

EXAMINATION BY COUNSEL FOR DEFENDANT

BY MR. FORTHAM [sic]:

Q. What is your name?

A. Thomas Heath.

Q. What is your address, sir?

A. 5804 Swamp Circle Road, Deale, Maryland.

Q. Can you tell me what your occupation is?

A. I am assistant to the deputy administrator of the Rural Electrification Administration.

Q. What educational degrees do you hold?

A. I have a Bachelor of Science in electrical engineering from Pennsylvania State University and (p. 7) additionally have done some postgraduate work at Texas A&M and Iowa State.

Q. When did you get your degree?

A. I got my degree in 1958.

Q. Would you describe your job experience after you got your degree.

A. Yes. I went with REA in 1958 and have been in several different positions with REA including field engineer and general field representative in Louisiana and east Texas, New Mexico and Arizona.

Q. When were you a field engineer in Louisiana?

A. 1960 and 1961.

Q. Go on.

A. Additionally, I have been this governments representative to the government of Bolivia for 3 years with the State Department on matters of rural electrification, rural telephony and petrochemicals. And additionally for a short period of time, under the auspices of San Diego State University, I taught Peace Corps volunteers who were preparing to go to South America to work in the field of rural electrification.

Q. How long have you held your current position?

* * *

(p. 15) particular situation.

Q. Okay. Do you know what my opponents are going to ask you in the case that you are going to be asked to testify in, in Louisiana?

A. No, I do not.

Q. Can you tell me how many states regulate the rates of co-ops at this time?

A. I don't have the exact figure but approximately half. We have borrowers in 46 states, so approximately

half of those are in states that have commission interaction with the co-ops in one form or another. There is no uniformity.

Q. Does the REA have any policy with respect to what co-ops should do in states that have rate regulation with respect to gaining approval of those rates from the state agencies?

A. Where the state has made it clear that there is jurisdiction in a public utility body, for the cooperatives, we expect the cooperatives to seek approval of whatever actions are within that jurisdiction.

Q. Does that include such things as securities

* * *

(p. 22) adversary process normally attends a request for a rate change by a utility?

A. By an adversary process, do you mean the very nature of the hearing process or do you mean that some interested party comes in as an adversary to a rate change?

Q. I am talking about the nature of the hearing process.

A. I have always considered them more exploratory and seeking of information rather than adversarial.

Q. Do you know if – let me ask you this. Are hearings normally conducted by the REA when a co-op wants to change its rates?

A. We have, as I have described before, an interpretive process with the cooperatives with regard to many

functions, rates included. We expect notification before rate changes take place. That gives us a review period in which to determine if the proposed action is suitable and meets the mortgage and loan contract criteria and have the chance to interact with the cooperative and see that their final action is appropriate. That is the process. You have referred to (p. 23) it as a hearing, but I've described the process.

Q. What I asked was does a hearing normally occur, a public hearing?

A. We do not have a public hearing.

Q. Is there normally presentation of sworn testimony?

A. No.

Q. Is there normally cross-examination of witnesses?

A. In the legal sense, whatever that means, because we discuss these matters. We ask questions as you would in an examination. We go through much of the same process. But if you are saying do we have a legal setup, that I have already indicated, we do not have a hearing as such. Rather, we gather information that you might also gather through a hearing process.

Q. Are notices of the rate change sent to interested parties by the REA?

A. Notices are sent by the cooperative itself.

Q. Do you know situations in which the REA has reduced rates or denied a rate increase request based on imprudent expenditures by management?